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No. 96-852

IN THE
Supreme Court of the United States

OCTOBER TERM, 1996

EARL WITTMER, EARL CRAIG COX AND JAMES JEFFERS,

Petitioners,

v.

HOWARD A. PETERS, III, AND STEPHEN McEVERS,

Respondents.

On Petition For Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Petition for Writ of Certiorari ("Petition") identifies the following questions as those presented for review:

1. Is the only form of race discrimination permitted by the Fourteenth Amendment to the United States Constitution discrimination that is narrowly tailored to remedy past race discrimination?

2. Does the Fourteenth Amendment to the United States Constitution permit race discrimination in employment decisions by a public employer when that employer has had no history of past race discrimination in employment?

3. If the Fourteenth Amendment to the United States Constitution permits race discrimination in employment decisions where there is no history of prior discrimination, are the appropriate standards permitting that race discrimination under the strict scrutiny test: 1) motivation by a truly powerful and worthy concern; 2) a racial measure that is a plainly apt response to that concern?

4. Did the Respondents violate the Petitioners' right to equal protection as guaranteed by the Fourteenth Amendment to the United States Constitution when they promoted an African-American over Petitioners to the position of lieutenant at the Illinois Department of Corrections primarily because he was an African-American?

PARTIES TO THE PROCEEDINGS

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INTRODUCTION

This case arises out of the efforts of the Illinois Department of Corrections ("the DOC") to transform certain first-time convicted felons into productive and responsible citizens by implementing "impact incarceration" programs, also known as boot camps. Substantial discovery was conducted in this litigation, and the relevant facts are essentially uncontested. In March 1993, when the DOC opened a boot camp in Greene County, Illinois, approximately two-thirds of the 200 inmates were expected to be African-American. In selecting the initial staff for the boot camp, the warden considered a variety of factors that he believed would best serve the unique aims of the correctional facility, including the skills, attributes and experiences of the forty-nine candidates deemed qualified for supervisory positions. In an effort to reduce the gross disparity between the racial compositions of the largely African-American inmate population and the overwhelmingly white security staff, and in order to ameliorate tensions and foster positive communications and relationships between the inmates and staff, the warden selected an African-American male to fill one of the ten lieutenant positions at the boot camp.

Petitioners are non-minority DOC employees who were not selected to fill any of the ten lieutenant positions at the boot camp. In 1994, petitioners filed this suit under 42 U.S.C. § 1983 alleging that their rights to equal protection were violated because the warden — in pursuit of his goal of creating and maintaining a safe and secure correctional institution — selected one African-American male on the basis of a racial preference.

The Seventh Circuit held that the warden's decision to promote one African-American male to serve as a

lieutenant at the boot camp was constitutional because it met this Court's strict scrutiny standard.[1]

Petitioners now ask this Court to issue a writ of certiorari on the principal contention that racial classifications that are not aimed at remedying the present effects of past discrimination may *never* withstand constitutional scrutiny. This contention, however, does not present a substantial question requiring resolution by this Court. Indeed, at oral argument in the Court of Appeals, Petitioners' counsel expressly conceded that there *are* compelling state interests, in addition to remedying past discrimination, that warrant the use of racial considerations. (A-6.) This totally appropriate and candid concession answers the primary legal question offered in the Petition.

Respondents — former DOC Director Howard A. Peters, III, and boot camp Warden Stephen L. McEvers — respectfully request that this Court deny the petition for a writ of certiorari. The Seventh Circuit faithfully applied the applicable legal standard to the undisputed facts in the record; the decision of the Court of Appeals therefore broke no new legal ground, and comports with this Court's mandate that all racial classifications must be subject to strict judicial scrutiny. In addition, important prudential considerations weigh against a grant of certiorari in this case.

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[1] The opinion of the Seventh Circuit is officially reported at 87 F.3d 916 (7th Cir. 1996), and is reproduced at Appendix A of the Petition. Citations herein to the Seventh Circuit's opinion are to "A-__."

STATEMENT OF THE CASE

A. The Promotion of Lieutenant Hilliard

The boot camp in Greene County, Illinois, is a military-style correctional institution designed to instill responsibility, discipline, self-respect, and respect for authority in first-time male offenders convicted of certain crimes. (S.O. App. 5.)[2] Inmates at the boot camp are required to submit to an arduous schedule of paramilitary exercises, physical training, and hard labor; they also participate in intensive programs relating to education, drug treatment, prerelease preparation, and counseling. (S.O. App. 5.) The boot camp employs an intense, highly structured and regimented routine which, unlike traditional prison environments, requires correctional officers and staff to be verbally aggressive and confrontational toward the inmates. (S.O. App. 5.)

Warden McEvers was responsible for filling all of the boot camp's sixty-one security positions, which included three captains, ten lieutenants, and forty-eight correctional officers. (S.O. App. 6.) He selected three white men as captains; of the forty-eight correctional officers only three were African-American. The manner in which the captains and correctional officers were selected is not challenged in this litigation.

Four of the ten lieutenant positions were filled through the non-discretionary Upward Mobility program, a contractually mandated promotion system based on seniority. (S.O. App. 7.) Through operation of this non-discretionary program, three appointments were awarded to

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[2] "S.O. App." refers to the Supplemental Appendix the State Officials filed with their brief in the United States Court of Appeals for the Seventh Circuit.

white men and one lieutenant position was awarded to an African-American woman. (S.O. App. 7.)

Eighty-four candidates who received a qualifying "A" grade applied to fill the six remaining lieutenant positions. (S.O. App. 6-7.) Forty-nine of those applicants, including Petitioners, passed a physical agility test and were invited to participate in an additional examination, interview, and evaluation process. (S.O. App. 7.) After the written tests and interviews were completed, Warden McEvers compiled a ranking of the candidates based on their scores. (S.O. App. 8.) Warden McEvers, however, did not appoint the lieutenants in rank order. Instead, based on his professional judgment as to the skills and "qualities they might have that would help us open this new facility best," Warden McEvers selected the candidates who ranked first, fourth, fifth, tenth, eleventh, and forty-second. (S.O. App. 10.) The Petitioners were ranked third, sixth and eighth. (S.O. App. 10.) Five of the men promoted were white; the sixth, Gregory Hilliard, who ranked forty-second and who was qualified based on the testing procedures, "was selected primarily because he is African-American." (S.O. App. 11.) The Employment Decision Form signed by Warden McEvers explained: "We endeavor to recruit and promote qualified minorities not only to meet affirmative action goals but also because the majority of our inmates are minorities." (S.O. App. 11.)

Warden McEvers testified at his deposition that when he selected Lieutenant Hilliard, he was aware that approximately two-thirds of the inmate population at the boot camp would be African-American; that only four of the other sixty members of the security staff were African-American; that no African-American males served on the supervisory security staff; and that all security personnel were required to be verbally aggressive and confrontational

toward inmates. (S.O. App. 9-10.) Warden McEvers also testified that based on his twenty-five years of experience in corrections, reducing the racial disparity between the inmates and security staff would ameliorate the tensions that might otherwise breed in the intense, confrontational boot camp environment, and would at the same time foster communication and positive relationships between the inmates and staff. (S.O. App. 9-10.)

As the Seventh Circuit found (A-8), Warden McEvers' judgment that the inclusion of one African-American male on the supervisory staff would advance the correctional aims of the boot camp was essentially undisputed. Respondent Peters, the former director of the DOC with more than twenty years of experience in prison administration, testified at length regarding the importance of race in the administration of prisons. (S.O. App. 12-15.) Mr. Peters explained that a prison is a completely different environment than other workplaces because inmates are confined, have no control over their lives, and are unable to interact with others or have normal life experiences. (S.O. App. 12-13.) Racial issues are critical to the DOC not only because inmates enjoy such limited freedoms and experiences, but also because a high proportion of minority inmates are incarcerated in facilities, like the boot camp at issue here, located in rural areas in central and southern Illinois where there is a small minority population. (S.O. App. 12-13.) Mr. Peters further explained (*id.*) that racial tensions are

> "heightened in a boot camp situation because . . . you've added some additional variables that aren't present in other prisons, *i.e.*, you not only allow but you encourage the staff to be very aggressive toward inmates, to holler at them. It's a very in your face kind of approach. You push and push and push

them right against the wall, then, you push some more."

The importance of racial diversity among the staff at the boot camp also was endorsed by the uncontested affidavits and uncontested reports of experts offered by Respondents. One of the experts, Larry Fields, served as the Director of the Oklahoma Department of Corrections. Director Fields has extensive experience in the personnel, security and operational issues that arise at boot camps. (S.O. App. 17.) Director Fields demonstrated that reducing the racial disparity between the inmate population and the security staff at a boot camp benefits the inmates, the staff, and the institution in a number of ways, including preventing disturbances at the boot camp and encouraging inmates to relate to and form positive relationships with the staff members. (S.O. App. 17.) Director Fields also stated that a racially diverse security staff is vital to the safe and efficient operation of a boot camp because "minority representation among the staff helps reduce inmates' perceptions that they are being treated unfairly because of their race." (S.O. App. 18.)

Respondents also submitted an expert report prepared by Professors Richard C. McCorkle and Terance D. Miethe of the University of Nevada-Las Vegas. The report, which draws on data from the U.S. Department of Justice's most current Census of Adult Correctional Facilities, found that the percentage of minority staff is "one of the strongest correlates and predictors of both inmate-on-inmate and inmate-on-staff assaults" in prisons across the country. (S.O. App. 249.) The McCorkle report noted that "[t]he finding that there is less safety for both inmates and staff in institutions with relatively more white than black guards holds true even after we control for other factors thought to influence rates of prison violence (*e.g.*,

level of security, population size, level of overcrowding)." (S.O. App. 249.) The McCorkle report – which was uncontested by Petitioners – concluded that "within medium security facilities and minimum security institutions like Greene's Boot Camp, small increases in minority staffing (e.g., increasing non-white staff from 5% to 10%) are associated with substantial decreases in the amount of prison unrest." (S.O. App. 251.)

The conclusions reached by Respondents' experts were essentially corroborated by the testimony of Petitioners themselves, as well as by one of their experts. In the words of Dr. Charles Newman, one of the experts retained by Petitioners, "all things being equal, if you have a fully competent staff which has minority representation, you are going to have a safer institution." (S.O. App. 18.)

B. The Decision In The District Court

The district court granted in part and denied in part the parties' cross motions for summary judgment in an Opinion dated August 31, 1995. (D-20.)[3] In its Opinion, the district court found that it was undisputed that Warden McEvers promoted Lieutenant Hilliard in order to advance the goal of creating and maintaining a safe and secure boot camp. (D-4.) The court also ruled that the "State of Illinois has a compelling interest in the safe and proper functioning of its boot camps" that may justify the consideration of race in employment decisions. (D-7.) The court concluded, however, that the evidence supporting the promotion of Lieutenant Hilliard failed to satisfy the strict scrutiny standard under the Equal Protection Clause. (D-6, D-15.)

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[3] The district court's opinion is reproduced at Appendix D of the Petition, and citations thereto are to "D-__."

The district court nonetheless entered summary judgment for Respondents because the court concluded that the doctrine of qualified immunity barred an award of damages against Respondents in their individual capacities, and the Eleventh Amendment barred an award of damages against them in their official capacities. (D-16 to D-19.) In two subsequent orders, the district court denied Petitioners' requests for injunctive relief (Order, October 20, 1995) and for attorneys' fees and costs (Order, November 20, 1995).[4]

C. *The Decision In The Court Of Appeals*

On appeal, the Seventh Circuit determined that Respondents were entitled to judgment on the merits of Petitioners' equal protection claim because "the selection of a black applicant for the lieutenant's position did not, in the circumstances of the case, violate the Constitution." (A-3.) The Seventh Circuit's legal analysis necessarily began with the recognition that "discrimination in favor of blacks and members of other minority groups, like discrimination against them, is subject to the test of strict scrutiny." (A-3 to A-4.) Applying the "skeptical, questioning, beady-eyed scrutiny that the law requires when public officials use race to allocate burdens or benefits," (A-4), the Seventh Circuit found that the promotion of one African-American lieutenant was (A-7):

> "needed because the black inmates are believed unlikely to play the correctional game of brutal drill sergeant and brutalized recruit unless there are some blacks in authority in the camp. This is not

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[4] Neither the court's grant of qualified immunity nor its rulings on Petitioners' requests for injunctive relief and attorneys' fees are before this Court. *See* Petition at i, 11 n.5.

speculation, but is backed up by expert evidence that the plaintiffs did not rebut."

REASONS FOR DENYING THE WRIT

Petitioners claim that this case presents four separate questions for the Court to review. (Petition at i.) In reality, Questions 1, 2 and 4 are essentially the same — they focus on Petitioners' contention that remedying the present effects of past discrimination is the *only* compelling state interest that may justify the consideration of race. Question 3 is Petitioners' unfounded effort to suggest that the Court of Appeals did not apply strict scrutiny in this case. As we demonstrate below, the Petition should be denied for three independent reasons.

First, as demonstrated in Part I, the Petition presents neither a substantial question of law nor a conflict among the lower courts which warrants review. Every appellate court called upon to review the question has determined that prison officials may consider race as a factor in making employment decisions if those decisions are necessary and proper in order to create and maintain a safe and secure correctional facility. Contrary to the Petitioners' position (Petition at 22-23), this Court never has ruled that remedying the present effects of prior discrimination is the only compelling state interest that may justify the consideration of race by a governmental entity. Indeed, the language and logic of the Court's recent decision in *Adarand Constructors v. Pena*, 115 S. Ct. 2097 (1995), confirms what several Justices have observed in past decisions: a variety of interests may justify the consideration of race if "they are narrowly tailored measures that further compelling governmental interests." *Id.* at 2113. In this case, the Court of Appeals dutifully adhered to this Court's precedents and faithfully applied strict scrutiny to the substantial, undisputed facts in the record. That the Court

of Appeals did so is unremarkable and does not warrant review by this Court.

Second, as we show in Part II, important prudential considerations militate against granting the writ. In Part II.A., we demonstrate that the Court should decline Petitioners' invitation to impose a *per se* rule prohibiting the use of race in all circumstances except one. Instead, the Court should allow the lower courts to address and resolve the myriad potential interests that may – or may not – satisfy the strict scrutiny test. In Part II.B., we demonstrate that the unique procedural posture of this case – including the district court's rulings on qualified immunity, injunctive relief, and attorneys' fees, as well as the substantial issue as to whether Petitioners were harmed by the warden's employment decision – renders this an inappropriate case for review by this Court.

In Part III, we demonstrate that, contrary to Petitioners' claim, the Seventh Circuit did not abandon the strict scrutiny test; to the contrary, the Court properly applied strict scrutiny analysis to the substantial, undisputed facts of this case.

I.

THE SEVENTH CIRCUIT'S APPLICATION OF STRICT SCRUTINY WAS ENTIRELY CONSISTENT WITH THE CONTROLLING PRECEDENTS OF THIS COURT.

A. The Petition Does Not Present A Substantial Question For Review By This Court.

Petitioners contend that this Court has prohibited every governmental racial classification that is not designed to remedy the effects of past discrimination, and that the Seventh Circuit consequently erred by not following this

Court's precedent. (Petition at 22-23.) This assertion is wrong, and Petitioners' expressly conceded at oral argument in the Seventh Circuit that there indeed *are* compelling state interests — in addition to remedying a history of past racial discrimination — which warrant the use of racial classifications. (A-6.)

Petitioners assertion that there is only one compelling state interest omits any discussion of *Adarand*, the Court's most recent and comprehensive ruling on the constitutional principles governing a public official's consideration of race. In *Adarand*, all nine Justices appeared to agree that interests other than remedying prior discrimination may constitute a compelling state interest. In analyzing the purpose and effect of the strict scrutiny standard, Justice O'Connor wrote for the Court (115 S. Ct. at 2113),

> "The point of carefully examining the interest asserted by the government in support of a racial classification, and the evidence offered to show that the classification is needed, is precisely to distinguish legitimate from illegitimate uses of race in governmental decisionmaking."

In justifying its conclusion that all racial classifications are subject to strict scrutiny, the Court explained that "[t]here is nothing new about the notion that Congress, like the States, may treat people differently because of their race only for compelling reasons." *Id.* at 2116. Quoting with approval from Justice Stevens' dissent in *Fullilove v. Klutznick*, 448 U.S. 448, 553-535 (1980), the Court observed that "[b]ecause racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic, it is especially important

that the reasons for any such classification be clearly identified and unquestionably legitimate." *Id.* at 2117.[5]

If, as Petitioners contend, remedying prior discrimination is the *only* compelling state interest that may justify a racial classification, there would no longer be a need for strict scrutiny; the only question for judicial review would be whether the means adopted by a government agency which sought to remedy its own prior discrimination were narrowly tailored. That is not, and never has been, the law. In this respect, *Adarand* reflects the Court's repeated recognition that other interests *may* constitute a compelling state interest. In *United States v. Paradise*, 480 U.S. 149, 167 n.18 (1987), for example, this Court expressly reserved the question whether the operational needs of the Alabama Department of Public Safety constituted a compelling state interest. In *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), this Court rejected the contention that providing "role models" for minority public

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[5] No member of the Court disagreed with the majority's analysis of this point. Indeed, the separate opinions of Justices Stevens, Souter and Ginsburg emphasize the potential application of strict scrutiny to a variety of interests and circumstances. *See* 115 S. Ct. at 2122 (opinion of Stevens, J.)("Nothing is inherently wrong with applying a single standard to fundamentally different situations, as long as that standard takes relevant differences into account"); 114 S. Ct. at 2132 (opinion of Souter, J.)("the Court's very recognition today that strict scrutiny can be compatible with the survival of a classification so reviewed demonstrates that our concepts of equal protection enjoy a greater elasticity than the standard categories might suggest"); 115 S. Ct. at 2136 (opinion of Ginsburg, J.)("I see today's decision as one that allows our precedent to evolve, still to be informed by and responsive to changing conditions").

school students justified a provision in a collective bargaining agreement which extended preferential protection against layoffs to some minority employees. Justice O'Connor's concurring opinion made clear, however, that (*id.* at 286)(O'Connor, J., concurring):

> "[C]ertainly nothing the Court has said today necessarily forecloses the possibility that the Court will find other governmental interests which have been relied upon in the lower courts but which have not been passed on here to be sufficiently 'important' or 'compelling' to sustain the use of affirmative action policies."

Justice Stevens' dissent in *Wygant* similarly observed that "in our present society, race is not always irrelevant to sound governmental decisionmaking." *Id.* at 512 n.2 (Stevens, J., dissenting). Pointing directly to the operational needs of a law enforcement agency, Justice Stevens emphasized that (*id.*):

> "[I]n a city with a recent history of racial unrest, the superintendent of police might reasonably conclude that an integrated police force could develop a better relationship with the community and thereby do a more effective job of maintaining law and order than a force composed only of white officers."

At bottom, Petitioners' argument rests entirely on the proposition that this Court's decision in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), prohibits state actors from ever considering race in their decisionmaking unless they are striving to remedy the present effects of past discrimination. *Croson*, however, involved a minority set-aside program designed expressly for the purpose of remedying prior discrimination; the Court's opinion in *Croson* did not address the potential

constitutionality of non-remedial racial classifications generally, let alone the specific context of prison administrators striving to create and maintain safe and secure boot camps. There is certainly nothing in the Court's holding in *Croson* that calls into doubt the Court's subsequent instruction in *Adarand* that strict scrutiny shall apply to all racial classifications.

Indeed, Justice Scalia's concurring opinion in *Croson* states that prison administrators may consider race to protect "life and limb" in a prison riot. 488 U.S. at 521 (Scalia, J., concurring). Such a compelling situation is, of course, unrelated to whether there was a history of past discrimination to remedy. Chief Judge Posner's opinion for the Seventh Circuit in this case makes the same point. (A-6.) *See also Lee v. Washington*, 390 U.S. 333, 334 (1968) (Black, Harlan and Stewart, concurring)("prison authorities have the right, acting in good faith and in particularized circumstances, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails"). And at oral argument in the Seventh Circuit, Petitioners' counsel conceded that — even in the absence of any history of past racial discrimination — prison authorities may constitutionally segregate inmates by race in the event of a race-related riot. (A-6.)

Having conceded that there are, in fact, instances where race is relevant to "sound governmental decisionmaking," *Wygant*, 476 U.S. at 512 n.2 (Stevens, J., dissenting), Petitioners must accept that the Seventh Circuit properly proceeded to evaluate whether the Respondents presented such an instance in staffing the Greene County boot camp.

B. There Is No Conflict On This Issue In The Courts Of Appeals.

Petitioners also contend that "there is a fundamental difference in interpretation of *Croson*" among the various Courts of Appeals and that "[t]his Court should not allow constitutional rights to vary depending on geography." (Petition at 17.) Petitioners are wrong. They fail to acknowledge that every appellate court which has squarely addressed the issue has concluded that the operational needs of law enforcement or correctional officials *may* justify the use of racial classifications in employment decisions. *See Hayes v. North State Law Enforcement Officers Ass'n*, 10 F.3d 207, 213-15 (4th Cir. 1993) (city police force); *Barhold v. Rodriguez*, 863 F.2d 233, 238 (2d Cir. 1988) (New York State Division of Parole); *Talbert v. City of Richmond*, 648 F.2d 425, 931-32 (4th Cir. 1981), *cert. denied*, 454 U.S. 1145 (1982) (city police force); *Detroit Police Officers' Ass'n v. Young*, 608 F.2d 671, 695-96 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981) (same); *Minnick v. California Department of Corrections*, 95 Cal. App. 3d 506, 157 Cal. Rptr. 260, 269 (1979), *cert. dismissed*, 452 U.S. 105 (1981) (state prison system).

Relying on the Fifth Circuit's decision in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996), Petitioners purport to find a split between the circuits that requires resolution by this Court. (Petition at 17.) In *Hopwood*, the Fifth Circuit held that the State's interest in promoting diversity at the University of Texas Law School did not justify a race-based admissions program. *Id.* at 948. It is true, as Petitioners argue (Petition at 16), that the Fifth Circuit's analysis contains broad dicta that "there is essentially only one compelling state interest to justify racial classifications: remedying past wrongs." *Id.* at

944. However, that dicta does not justify a grant of certiorari in this case for two independent reasons.

First, the broad reasoning employed by the panel majority in *Hopwood* was plainly unnecessary to the Court's decision. Despite suggesting that only one compelling state interest will justify a race-based decision, the majority in *Hopwood* explained at length why diversity in an educational setting was not a compelling interest even in the absence of a *per se* rule. *Id.* at 945-48. Furthermore, as noted in Judge Wiener's concurring opinion, the *Hopwood* majority did not need to reach this issue because even assuming that diversity constituted a compelling state interest, the admissions program at the University of Texas Law School "was not narrowly tailored to achieve diversity." *Id.* at 962. For this reason, the seven judges who dissented from the denial of rehearing *en banc* in *Hopwood* emphasized that the panel's finding of a *per se* rule was "wholly unnecessary to the disposition of the matter appealed and thus is clearly dictum." *Hopwood v. Texas*, 84 F.3d 720, 722 (5th Cir. 1996).[6]

Second, the Fifth Circuit's dicta in *Hopwood* is substantively identical to the dicta employed by the Seventh Circuit in earlier cases that similarly suggested that the remediation of prior discrimination is the only compelling

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[6] The Fifth Circuit's decision is also of limited impact for the additional reason that it may not have involved a live controversy for the purposes of Article III of the United States Constitution. In their opinion respecting the denial of the petition for a writ of certiorari in *Hopwood*, two Justices of this Court indicated that the Fifth Circuit's decision was not worthy of review because the admissions program at issue had been discontinued and therefore was not "genuinely in controversy." 116 S. Ct. at 2581 (Opinion of Ginsburg, J.).

state interest that may justify a racial classification. In *Milwaukee County Pavers Ass'n v. Fiedler*, 922 F.2d 419, 421-22 (7th Cir. 1991), involving a Wisconsin set-aside program for highway contracts, Judge Posner himself suggested in dicta that after this Court's decision in *Croson*, remedying past discrimination was the only cognizable compelling interest. 922 F.2d at 421. *See also Billish v. City of Chicago*, 989 F.2d 890, 893 (7th Cir. 1993) (en banc) ("The Supreme Court has . . . carved an exception for the case in which discrimination against whites is necessary to rectify previous discrimination in their favor committed by the state agency that is seeking to practice remedial discrimination.")

However, when actually presented with the facts demonstrating the State's compelling interest in this case, Chief Judge Posner correctly retreated from the dicta in *Milwaukee County Pavers*. Chief Judge Posner explained that (A-5):

> "The dicta on which the plaintiffs rely were uttered in cases that did not involve, by judges who had never had cases that involved, the racial composition of a prison's staff. Such cases were not, at least insofar as one can glean from the opinions, present to the minds of the judges when they considered and rejected other grounds for discrimination and expressed that rejection in the sweeping dicta that we have mentioned. The weight of judicial language depends on context, by these plaintiffs ignored."

We respectfully submit that when it is confronted by a case directly raising the issue, the Fifth Circuit — like the Seventh Circuit — will retreat from its broad dicta and recognize a state's compelling interest in maintaining safe and secure boot camps. There simply is no conflict that warrants review by this Court; at a minimum, the Court should await a contrary decision on the merits of this issue

rather than grant certiorari based on broad dicta suggesting that, in the future, one Court of Appeals might take a different approach.

II.

PRUDENTIAL CONSIDERATIONS STRONGLY MILITATE AGAINST GRANTING CERTIORARI IN THIS CASE

Important prudential considerations also weigh against review of the Seventh Circuit's decision in this case. *Adarand* instructs that racial classifications "are constitutional only if they are narrowly tailored measures that further compelling governmental interests." 115 S. Ct. at 2113. The Seventh Circuit faithfully applied this strict scrutiny standard in determining that the promotion of one African-American male was narrowly tailored to further the State's compelling interest in creating and maintaining a safe and successful boot camp. (A-4 to A-9.) As we show in Part II.A., it is simply too soon to know whether the lower courts will have difficulty differentiating in other cases between constitutional and unconstitutional considerations of race.

In Part II.B., we demonstrate that certiorari also should be denied because of the unique procedural posture of this case. In light of the district court's rulings that Respondents were entitled to qualified immunity, that Petitioners were not entitled to injunctive relief or attorneys' fees, and that the Petitioners suffered no judicially cognizable harm, there is little likelihood that granting the writ will change the position of the parties vis-a-vis each other.

A. In The First Instance This Court Should Permit The Lower Courts To Evaluate The Constitutionality Of Racial Considerations That May Never Have Occurred To The Parties Or To Members Of The Court.

In her dissenting opinion in *Arizona v. Evans*, 115 S. Ct. 1185 (1995), Justice Ginsburg observed that "when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court." *Id.* at 1198 n.1 (Ginsburg, J., dissenting, citations omitted). *See also McCray v. New York*, 461 U.S. 961, 963 (1983) (opinion of Stevens, J.) ("further consideration of the substantive and procedural ramifications of this problem by other courts will enable us to deal with the issue more wisely at a later date.") This salutary practice strongly militates against review in this case because the lower courts should be given time to address and resolve actual cases asserting actual interests, rather than accepting Petitioners' invitation to render – prematurely – a *per se* rule.

Petitioners lament the uncertainty that will flow from allowing the lower courts to pass judgment on racial classifications which are not at issue in this case. (Petition, 22-25.) But specific racial classifications should not be embraced or precluded out of hand before the courts have an opportunity to test them against the searching standard of strict scrutiny. Only by permitting the lower courts to embark on the task of ferreting out "legitimate from illegitimate uses of race in government decisionmaking," *Adarand*, 115 S. Ct. at 2113, will the Court be able to make an informed judgment about the possible array of race-based decisions that may survive constitutional scrutiny. If denying the Petition will allow the lower courts to continue

this inquiry, as Petitioners suggest, there is no reason to grant the writ.

The Seventh Circuit's holding below is expressly limited to the specific, uncontested facts of this case, *i.e.*, the appointment of a single African-American male to the position of lieutenant at a prison boot camp with an inmate population that is overwhelmingly African-American for the express purpose of creating and maintaining a safe and secure boot camp. (A-8.) There may be other circumstances in which government decisionmakers may constitutionally consider race. *See, e.g.*, p. 14 above. It would be presumptuous, however, to try to identify in the abstract those racial classifications that will pass constitutional muster and those that will not. This Court has consistently identified the appropriate standard to apply to racial classifications; it should now allow the lower courts to apply that standard to new and varied factual situations.

B. The Unique Procedural Posture Of This Case Militates Against Granting The Writ.

This Court has commented repeatedly that "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *See, e.g., North Carolina v. Rice*, 404 U.S. 244, 246 (1971); *DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974). Due to the unique procedural posture of this case, it is unlikely that any decision of this Court would affect the rights of the litigants. The Court therefore should deny the Petition and devote its resources to a conflict that has a more realistic chance of creating tangible relief for one of the parties.

As shown above at page 7, the district court, without any real explanation, rejected the wealth of evidence Respondents offered to support the racial classification at issue here, and therefore ruled that Petitioners had suffered

a constitutional violation. (D-8 to D-15.) The district court nonetheless entered judgment in favor of Respondents on the question of monetary damages, holding that Respondents were entitled to qualified immunity because they had not violated a "clearly established" constitutional right. (D-16 to D-19.) Despite finding a constitutional violation, the district court also refused to issue the injunction Petitioners sought, which would have required that they be appointed to lieutenant positions at the boot camp. (Order, October 20, 1995.) The district court reasoned that "the requested relief is far too speculative in nature to be granted," (*Id.* at 2), and that Petitioners could not prove causation because "even if Warden McEvers did not take race into consideration regarding the final lieutenant position, certainly Plaintiffs cannot establish that one of them would have been selected for the final promotion." (*Id.* at 4 n.3.) In light of Petitioners failure to win any of the relief they sought, the district court also denied Petitioners' request for costs and attorneys' fees. (Order, November 20, 1995.)

On appeal to the Seventh Circuit, Petitioners argued that the district court erred in holding that Respondents were entitled to qualified immunity, and erred further in denying Petitioners an injunction, costs, and attorneys' fees. (A-3.) The Court of Appeals did not reach those issues, however, because it held that Petitioners had not suffered a constitutional violation. (A-3.) As a result, even assuming purely for the sake of argument that this Court grants the Petition *and* rules in Petitioners' favor, the rulings below which denied Petitioners any measure of relief (and which were not encompassed within Petitioners' Questions Presented) indicate that Petitioners have little hope of achieving anything other than a hollow ruling. Because a decision by this Court would have little, if any, impact on Petitioners' rights, this case is inappropriate for review.

III.

THE COURT OF APPEALS CORRECTLY APPLIED STRICT SCRUTINY IN THIS CASE AND REACHED THE CORRECT RESULT.

In a strained effort to interest this Court in granting the writ, Petitioners contend that the Seventh Circuit failed to adhere to the strict scrutiny standard and applied its own, less stringent legal test.[7] Petitioners' suggestion that the Seventh Circuit abandoned strict scrutiny is demonstrably incorrect. The Seventh Circuit not only cited, but faithfully applied this Court's strict scrutiny test, emphasizing "the skeptical, questioning, beady-eyed scrutiny that the law requires when public officials use race" in making decisions. (A-4.) It is simply wrong for Petitioners to suggest that the Seventh Circuit would affirmatively state that Respondents' conduct in this case "is subject to the test of strict scrutiny," (A-4), and then, in the following paragraph, apply a different test. The language on which Petitioners rely merely reflects the Seventh Circuit's attempts to explain — not change — the meaning of the terms "compelling state interest" and "narrowly tailored." *See Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 188-89 (1979) (Blackmun, J. concurring). Indeed, the Seventh Circuit's faithfulness to the strict scrutiny standard is aptly captured in the Court's observation that to justify the use of race in this case, Respondents were required to "show that they had

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[7] According to Petitioners, "the Court of Appeals set forth new standards for governing race discrimination: 'a truly powerful and worthy concern' and that the racial measure taken is 'a plainly apt response to that concern.' Petitioners submit this is a far cry from the narrowly tailored remedy to deal with prior race discrimination." (Petition at 18-19.)

to do something and had no alternative to what they did." (A-4.)

The Court of Appeals faithfully applied the strict scrutiny analysis to the action taken by Respondents and properly concluded that Respondents' conduct survived this "questioning, beady-eyed scrutiny." (A-4.) Although Petitioners argue that there were alternatives to including a single African-American male on the supervisory staff, (*see* Petition at 19), the Seventh Circuit correctly found that Petitioners did not present any testimony or other evidence that challenged the belief that the promotion in question was "essential." (A-8.) One can hardly imagine a more narrowly tailored action than a prison warden promoting *one* African-American employee in an attempt to create and maintain a safe and secure correctional facility. Content to "lose on the issue of liability" once the Court of Appeals rejected their principal legal contentions (A-9), Petitioners' second-guessing of Respondents' well-supported professional judgment does not warrant review by this Court.

CONCLUSION

For the foregoing reasons, Respondents request that this Court deny the petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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